FILED

961063 DEC 19 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

PETTCO ENTERPRISES, INC., *et al.*,

Petitioners,

vs.

JAMES WHITE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

M. JACK HOLLINGSWORTH
Counsel of Record
M. JACK HOLLINGSWORTH
AND ASSOCIATES, P.C.
Attorneys for Petitioners
15 South 20th Street
Suite 110
Birmingham, Alabama 35233
(205) 323-2226

70162

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

81pp

QUESTIONS PRESENTED FOR REVIEW

1. Are the rights of due process and equal protection of the citizens of the State of Alabama, and all those similarly situated, denied or violated, within the meaning of 42 U.S.C. § 1983, by a means established by the State of Alabama for recovery of injuries sustained by third parties due to motor vehicle accidents in which the driver at fault is a work-release or other inmate of the State correctional system, when that compensation is not equivalent to the compensation established by the State for injuries sustained by third parties due to motor vehicle accidents when the driver at fault is a State agent or employee?

2. Are work-release or other inmates of the State of Alabama to be considered "employees" of the State for purposes of those State policy and procedures, legislatively established, to compensate third parties for injuries sustained due to motor vehicle accidents where the vehicle at fault is operated by a State agent or employee?

PARTIES TO THE PROCEEDINGS

Petitioners here are the Plaintiffs in the underlying action, as stated in the Second Amended Complaint:

> Pettco Enterprises, Inc., a corporation doing business in the State of Alabama,
>
> Larry B. Petty, a citizen of the State of Alabama and a principal of Pettco Enterprises, Inc., and all those individuals, partnerships, corporations, or any other person similarly situated and within the meaning of the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments, and within the meaning of "person" in 42 U.S.C. § 1983.

Respondents here are the Defendants in the underlying action, as stated in the Second Amended Complaint [note: although some officials have since been replaced by others in certain positions, these are the names, titles, and duties of the Defendants, as of the time of the Second Amended Complaint]:

> James C. White, Jr., individually and as Director of the Finance Department of the State of Alabama;
>
> Tommy Herring, individually and as Commissioner of the Department of Corrections of the State of Alabama;
>
> Ron Sutton, Individually and as Associate Commissioner of the Department of Corrections of the State of Alabama;
>
> Roy Hightower, Individually and as Regional Coordinator of the Work Release Program of the Department of Corrections of the State of Alabama;

Willie Johnson, Individually and as Regional Coordinator of the Work Release Program of the Department of Corrections of the State of Alabama;

Randall Lucas,, Individually and as Director of the Childersburg Community Work Center;

Jerry L. Ferrell, Individually and as Director of the Loxley Community Work Center;

M. J. Thurman, Individually and as Director of the Alex City Work Release Center;

Ronald Weaver, Individually and as Director of the Atmore Work Release Center;

Pat Halliday, individually and as Director of the Birmingham Work Release Center;

Leon Forniss, Individually and as Director of the Camden Work Release Center;

Billy Mitchem, Individually and as Director of the Decatur Work Release Center;

Glen Newton, Individually and as Director of the East Thomas Work Release Center;

Edward Gullion, Individually and as Director of the Elba Work Release Center;

Billy Owen, Individually and as Director of the Hamilton Work Release Center;

James E. Reynolds, Individually and as Director of the Mobile Work Release Center;

Richard Baker, Individually and as Assistant Director of the Montgomery Work Release Center;

as well as those individuals who have defined, implemented, and carried out the policies, customs, practices, and procedures that allow State inmates in the custody and control of the Department of Corrections of the State of Alabama to drive Stateowned vehicles on the public roads of Alabama without affording them the same liability co4verage provided to all other agents and employees of the State of Alabama under Alabama Code § 36-1-6 and § 36-1-6.1 (1975).

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings	ii
Table of Contents	v
Table of Citations	vi
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	5
Statement of Facts	7
Reasons for Granting Writ	14
I. Refusing insurance coverage for work-release or other inmate drivers or declaring work-release inmates not to be state agents or employees for purposes of insurance as to motor vehicle accidents, or otherwise refusing to acknowledge responsibility for injuries negligently committed by work-release or other inmates, violates Petitioners' rights to due process.	14

Contents

Page

II. Refusing insurance coverage for work-release or other inmate drivers or declaring work-release or other inmates not to be state agents or employees for purposes of insurance as to motor vehicle accidents violates Petitioners' rights to equal protection. 24

Conclusion 29

TABLE OF CITATIONS

Cases Cited:

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 28

Baker v. McCollan, 443 U.S. 137 (1979) 14

Bowen v. Gilliard, 485 U.S. 587 (1987) 26

City of Canton v. Harris, 489 U.S. 378 (1988) 22

Collins v. City of Harker Heights, 503 U.S. 115 (1992) 21

Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) . 18, 19, 20

Daniels v. Williams, 474 U.S. 327 (1986) 15

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 19, 20

Contents

Page

Doe v. United Social and Mental Health Services, 670 F. Supp. 1121 (D. Conn. 1987) 23

Durflinger v. Artiles, 563 F. Supp. 322 (D. Kan. 1983), *aff'd*, 727 F.2d 888 (10th Cir. 1984) 23

Farmer v. Brennan, 511 U.S. __, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) 22

Federal Communications Commission v. Beach Communications, 508 U.S. __, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993) 25, 26

Fox v. Custis, 712 F.2d 84 (4th Cir. 1983) 17

Frett v. Government of Virgin Islands, 839 F.2d 968 (3rd Cir. 1988) 23

Gibson v. United States, 457 F.2d 1391 (3rd Cir. 1972) 23

Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983) 17

Jones v. Phyfer, 761 F.2d 642 (11th Cir. 1985) 17

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 27

Lynch v. Automobile Workers, 485 U.S. 360 (1988) ... 27

Martinez v. California, 444 U.S. 277 (1980) 17, 19

Contents

Page

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 27

Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) 16, 17, 20

Parratt v. Taylor, 451 U.S. 527 (1981) 21

Payton v. United States, 636 F.2d 132 (5th Cir. 1981), *on rehearing*, 679 F.2d 475 (5th Cir. 1982) 23

Screws v. United States, 325 U.S. 91 (1945) 14

Sullivan v. Stroop, 496 U.S. 478 (1990) 26

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 26

Vance v. Bradley, 440 U.S. 93 (1979) 26, 27

Statutes Cited:

Alabama Code § 14-3-47(a) 4

Alabama Code § 14-8-2 5

Alabama Code § 14-8-40 5

Alabama Code § 36-1-6.1 10

Alabama Code § 36-1-6.1(a) 4

Contents

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1343(3)	2
42 U.S.C. § 1983	*passim*
United States Constitution Cited:	
Fifth Amendment	2, 3
Eighth Amendment	22
Fourteenth Amendment	2, 3
Rules Cited:	
Federal Rules of Civil Procedure:	
Rule 23(a)	6
Rule 23(b)(1)(A)	6
Rule 23(b)(1)(B)	6
Rule 23(b)(2)	6, 10
Rule 56	28
Supreme Court Rule 12.1	2
Supreme Court Rule 13.1	2

Contents

Page

Other Authority Cited:

Restatement of Torts (2d) § 319 22

APPENDIX

Appendix A — Judgment of the United States Court of Appeals for the Eleventh Circuit Filed September 20, 1996 ..... 1a

Appendix B — Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division Filed August 18, 1995 ..... 3a

Appendix C — Second Amended Complaint 32a

Pettco Enterprises, Inc., *et al.*, Petitioner, by their attorney, under appropriate rules of this Court, and for the reasons stated below, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions below are not published. The pertinent opinions are made part of the Appendix to this Petition.

On August 18, 1995, the United States District Court for the Middle District of Alabama (Northern Division) , granted summary judgment sought by Respondents, James C. White, *et al.* as Defendants, on both counts of the Second Amended Complaint filed by Petitioners, Pettco Enterprises, Inc., *et al.*, as Plaintiffs.

Petitioners' claims related to the means established by the State of Alabama for compensating victims of injuries sustained in motor vehicle accidents where the vehicle at fault was operated by a work-release or other inmate of the State of Alabama correctional system. Petitioners contended below and contend here that this system of compensation is so inadequate — as opposed to methods of compensation available through the state for injuries sustained in accident situations not involving work-release or other inmates as drivers — that the compensation system at issue violated Petitioners' rights to equal protection and due process and thus relief was permissible under 42 U.S.C. § 1983.

The District Court determined that the facts were not in dispute and that neither due process nor equal protection rights were implicated or violated by the compensation system for injuries which may be sustained by citizens travelling Alabama roads in the event of an accident with a vehicle negligently

operated by a work-release or other inmate. The District Court further found that in such circumstances no "special relationship" existed, with respect to an injury suffered by the act of a third person. Therefore, there was no recovery against the State or its officials for such injuries under 42 U.S.C. § 1983.

Petitioners appealed this summary judgment ruling. On September 20, 1996, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court without opinion.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court was invoked through 28 U.S.C. § 1343(3), and 28 U.S.C. § 1983, this being an action to redress a deprivation, under color of a state law, statute, ordinance, regulation, custom, practice, or usage, of the rights of Equal Protection and Due Process guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

Jurisdiction of the United States Court of Appeals for the Eleventh Circuit was invoked under 28 U.S.C. § 1291.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l) and under Rules 12.1 and 13.1 of the Rules of this Court, as amended. The decision of the United States Court of Appeals for the Eleventh Circuit was issued September 20, 1996. This Petition is being filed within 90 calendar days of that decision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution (pertinent part):

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

Fourteenth Amendment, United States Constitution (pertinent part):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (pertinent part):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

> and laws, shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress.

Alabama Code, § 36-1-6.1(a) (pertinent part):

> [t]he various state agencies, departments, boards, or commissions shall determine and report their needs for liability coverage to the finance director, the insurance commissioner, and the attorney general. The finance director, with the advice of the insurance commissioner and the attorney general, shall then determine the type of blanket policy needed to provide basic coverage for deaths, injuries, or damages arising out of the negligent or wrongful acts or omissions committed by state employees or agents of the state . . . while in the performance of their official duties in the line and scope of employment. . . . Any policy of insurance or reinsurance shall be selected by the finance director on a competitive bid basis.

Alabama Code, § 14-3-47(a) (pertinent part):

> State inmates shall be employed at such labor, in such places and under such regulations within the state as may be determined by the department of corrections. . . . The department of corrections is authorized to direct inmates to work at any labor and at any site except as provided otherwise by law.

Alabama Code, § 14-8-2 (pertinent part):

> (a) The board [Board of Corrections] is authorized to adopt regulations and policies permitting the commissioner to extend the limits of the place of confinement of an inmate, as to whom there is a reasonable cause to believe he will know his trust, by authorizing him, under prescribed conditions, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to work at paid employment while continuing as an inmate of the institution or facility in which he shall be confined except during the hours of his employment or seeking of employment and traveling thereto and therefrom.

Alabama Code, § 14-8-40 (pertinent part):

> No inmate granted privileges under the provisions of this article shall be deemed to be an agent, employee or involuntary servant of the board, state or county while involved in the free community or while going to and from employment or other specified areas.

STATEMENT OF THE CASE

The original class action Complaint in this matter was filed in the United States District Court for the Middle District of Alabama (Northern Division) on March 1, 1994. The Complaint was answered by the various named Defendants.

The Commissioner of Insurance for the State of Alabama

filed a summary judgment motion on July 26, 1994. This motion was granted in September, 1994. The remaining Defendants moved for summary judgment in July, 1994 on issues such as qualified sovereign immunity and Eleventh Amendment immunity. This motion was denied.

On August 26, 1994, Petitioners as Plaintiff submitted a memorandum with respect to the matter proceeding as a class action under Federal Rules of Civil Procedure 23(a) and 23 (b)(2). An evidentiary hearing was held and supplemental briefs were filed.

On September 19, 1994, pursuant to leave of Court granted on September 9, 1994, an amended complaint was filed. Under the amended complaint, Plaintiffs sought declaratory and injunctive relief, but not damages. The amended complaint also sought class certification only under 23(b)(1)(A).

On December 22, 1994, the District Court denied Petitioners, request for class certification under Rule 23(b)(1)(A). Petitioners sought reconsideration and also sought to further amend the complaint so as to seek class certification under Rule 23(b)(1)(B) or Rule 23(b)(2) .

On May 23, 1995, the District Court granted the motion to amend the complaint. The Court denied reconsideration as to its earlier decision declining class certification under Rule 23(b)(1)(A) but, as to the Second Amended Complaint, did certify a class under Rule 23(b)(2).

Respondents, as Defendants, filed motions for summary judgment on June 12, 1995. On August 18, 1995, the District Court issued a memorandum opinion and order granting summary judgment.

Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit. On September 20, 1996, the Court of Appeals affirmed in a one-line, per curiam, unreported opinion.

STATEMENT OF FACTS

On June 7, 1993, a Department of Corrections van driven by a State of Alabama inmate, one Eugene Horton Stevenson, struck the rear of a four-wheel drive pick up truck operated by Larry B. Petty ("Mr. Petty") , a principal of Pettco Enterprises, Inc. ("Pettcoll) , which owned the vehicle he was driving. The Pettco vehicle was travelling northbound on Highway 11, and as the Pettco vehicle slowed to make a left turn, using its turn signal, the State van collided with it from behind. The collision, at nearly the full rate of speed, knocked the Pettco vehicle about 75 feet from the point of impact and Mr. Petty narrowly avoided colliding with oncoming traffic. The impact broke the seat bottom of the driver's seat and the seat back.

The driver and passengers of the State vehicle appeared to have no injuries and walked around the accident scene freely. The driver of the van indicated to Mr. Petty at the time of the accident that the van's brakes had failed, although no mention of this possible cause of the collision was made in the accident report or in later proceedings.

Mr. Petty suffered serious injuries to his face due to this accident, incurring major dental expenses. He suffered significant pain and suffering due to the accident, and he lost time from his business. The accident also resulted in substantial loss to the vehicle and in assorted additional business expenses in excess of $4,000.

It was evident that the driver of the van, a work-release inmate, was at fault. Mr. Petty then attempted to seek compensation for his damages and injuries.

Inmates on work-release (or for that matter, other inmates who may be conducting business of the State such as operating State vehicles at the direction and control of correctional systems officials) are not considered employees of the State of Alabama for purposes of Alabama Code sections providing for insurance coverage so as to allow recovery for injuries sustained by others, if a State employee acts negligently, such as operating a motor vehicle during the course of employment and is at fault in a vehicle accident. That is, State of Alabama employees are covered under the General Liability Trust Fund for such accidents.

Instead, in accident situations involving a vehicle operated by a State inmate, such as those on work-release, any injured party must file a claim with the State Board of Adjustment, to which all monetary claims against the Department of Corrections are filed. The Department of Corrections responds to the claim. The Board reviews and evaluates the claim and determines if, and to what extent, any compensation will be paid.

Pettco, on behalf of Mr. Petty, filed a claim with the State Board of Adjustment on July 6, 1993 regarding injuries and damages sustained in the June 7, 1993 accident. Pettco sought $757 for uninsured dental expenses incurred by Mr. Petty due to the accident, $2,557.83 for property damage, $952.14 for other damages, and interest of $1 per day from the date of the accident until satisfaction. The Pettco vehicle was insured, but Pettco had not filed a claim with its insurer at the time the Board of Adjustment claim was filed.

The Board of Adjustment, in late 1993, eventually offered an amount for the Pettco claim which included reimbursement for his deductible should he file a claim with his own insurance company, and payment of dental and other business expenses. However, this amount did not adequately compensate Pettco (or

Mr. Petty for that matter) for the damages and injuries suffered due to an accident which was in no way the fault of Mr. Petty. The Board's determination as to compensation also did not at all address Mr. Petty's pain and suffering. Pettco (and Mr. Petty) declined the Board of Adjustment payment.

As Petitioners have noted, claims by a member of the public against the Department of Corrections for harm caused in accidents where an inmate, such as a work-release inmate, was the driver was at fault are not covered by State insurance which is extended to State employees. This is due to State policy, established by statute, declaring that the inmate or work-release inmate is not an agent or employee of the State of Alabama and thus is not covered under the General Liability Fund.

Beginning in October of 1992, the State broadened the General Liability Trust Fund guidelines to cover auto liability of State employees acting in the scope of their employment. The Trust Fund, which provides insurance for the State, does not usually insure specific vehicles, rather it insures drivers. For example, a State agency will submit a list of employees who will be driving certain State-owned vehicles and the insurance covers them. Therefore, because inmates are not, by statute, employees or agents of the State, any claim submitted to the General Liability Trust Fund for injuries involving a State-owned vehicle operated by a work-release or other inmate would be rejected.

Subsequently, Pettco and Mr. Petty filed an action, on their behalf and on behalf of all those similarly situated, in the United States District Court for the Middle District of Alabama (Northern Division). Numerous Defendants within the State of Alabama correctional and insurance systems were named (as noted in this Petition). Eventually, the District Court issued class certification on the Second Amended Complaint under Rule

23(b)(2). [For the Second Amended Complaint in its entirety, *see* Apx. 32a-41a.]

Respondents, as Defendants, filed motions for summary judgment on June 12, 1995. On August 18, 1995, the District Court issued a memorandum opinion and order granting summary judgment.

In its Memorandum and Opinion granting summary judgment [Apx. 3a *et seq.*, the District Court (Albritton, J.) noted it was undisputed that: the policy and procedure of the Department of Corrections permits work-release inmates (and at times, even other inmates) to drive State-owned vehicles; there are no uniform rules governing inmates who operate State-owned vehicle — each correctional facility apparently promulgating its own rules, and that work-release (or other) inmates have been involved in traffic accidents which have caused property damage or personal injury.

The District Court observed that "the practice of using inmates to drive State-owned vehicles is authorized by statute." [Apx. 13a and *see* Apx. 5a, at fn. 2]. The court further recognized that, although Alabama law does not require that owners and operators of motor vehicles carry liability insurance, Alabama law does provide a mechanism by which State agents or employees who operate motor vehicles in the performance of their duties may acquire insurance. Also, the State provides insurance coverage for negligent or wrongful acts of State employees or agents causing harm to third parties, such as vehicle accidents. [Apx. 14a, p. 12, citing Alabama Code, § 36-1-6.1].

The District Court in its Memorandum stated that 42 U.S.C. § 1983, under which Petitioners' claim proceeded, is not a source of rights, but a means of vindicating federal rights. The court

ruled, however, that no equal protection or due process violation is present by the disparity in the system of State compensation for motor vehicle injuries caused by work-release or other inmates operating State vehicles as opposed to State employees driving State vehicles.

As to equal protection, the District Court noted that since these circumstances did not involve a suspect classification or impinge on a fundamental right, equal protection is satisfied if the legislative means creating the apparent disparity is rationally related to a legitimate governmental purpose, stating [Apx. 18a-19a]:

> Plaintiffs do not contend, nor does this court find, that the scheme set up by Alabama law involves any suspect classification or fundamental right. What discrimination, may exist is not invidious; the Alabama statutory provisions and the decisions of the State agencies implementing them are rationally related to the State's legitimate interest in saving money and allocating scarce State resources efficiently.
>
> * * *
>
> Plaintiffs would have this court consider the case as one involving an arbitrary decision by officials of the State. Specifically, they point to what they characterize as the State's arbitrary decision to allow inmates to drive State-owned vehicles. Plaintiffs fail to cite any cases that supports their contention that such a decision amounts to a deprivation of the rights protected by the Equal Protection Clause of

> the Fourteenth Amendment. Moreover, the court finds that it is clear that this is not an arbitrary decision. It is a decision authorized by State law and rationally-related to the goal of saving the State of Alabama money. Thus, the defendants have not violated plaintiffs' rights to Equal Protection of the laws by making a decision that it would be too costly to either do without inmate labor being able to drive State-owned vehicles or to provide insurance for inmate drivers.

As to due process, the District Court, in finding there was no due process violation in this system, stated [Apx. 20a]:

> The State action which is alleged to have caused plaintiffs' constitutional deprivation is not the inmate's negligent driving of the vehicles. Rather, plaintiffs contend that the state's policy decisions not to acknowledge that the inmate drivers are agents or employees of the State and provide them with insurance are the cause of, the deprivation. Plaintiffs contend that the defendants should recognize that the inmate drivers are agents or employees despite the fact that such an acknowledgment is contrary to State law. Plaintiffs assert that the facts of the instant case are sufficiently analogous to the facts of cases where courts have held State actors liable for the intentional acts of third parties to require this court to find State liability. This court does not agree.

The District Court found that the State's decision not to

provide insurance to inmates driving State-owned vehicles is not arbitrary or a due process violation. The Court found the suggestion otherwise to merely be an attempt to avoid the effects of sovereign immunity. [Apx. 21a-22a]. The court further found that the substantive component of due process barring arbitrary or wrongful government actions and preventing the government from engaging in conduct that "shocks the conscience" is not implicated by these circumstances.

Nor did the Court find, consistent with due process, any "affirmative right to governmental aid" in such instances. That is [Apx. 27a]:

> Plaintiffs have not articulated, nor can this court envision, how the actions of the defendants constitute State action that shocks the conscience or interferes with rights implicit in the concept of ordered liberty by exercising its right to employ inmate labor, its privileged not to provide insurance coverage, and its decision not to reimburse victims of the negligent behavior of the inmates except through the Board of Adjustment proceedings.

The District Court determined that those instances in which liability was found for injuries inflicted upon a third person by an inmate to not be sufficiently analogous to the present situation. In fact, the District Court concluded that such authority was "irrelevant to the instant suit." [Apx. 27a *et seq.* and see footnote 9]. It concluded: "This court finds that no tortured reading of [these cases] compels this court to find that the State of Alabama or its officials must accept responsibility for the negligent conduct of the inmates that drive State-owned vehicles by extending insurance coverage to these drivers or else violate

the due process rights of any citizen who may encounter such a driver in an accident [on] an Alabama highway." [Apx. 29a].

The court suggested that any disparities or inequities which may exist should be corrected through the legislative process rather than through the courts. [Apx. 30a]. Summary judgment thus was granted. [Apx. 31a].

On appeal from this grant of summary judgment, the Eleventh Circuit summarily affirmed. There was no opinion. [Apx. la-2a]. No motion for reconsideration was filed.

REASONS FOR GRANTING WRIT

I.

REFUSING INSURANCE COVERAGE FOR WORK-RELEASE OR OTHER INMATE DRIVERS OR DECLARING WORK-RELEASE INMATES NOT TO BE STATE AGENTS OR EMPLOYEES FOR PURPOSES OF INSURANCE AS TO MOTOR VEHICLE ACCIDENTS, OR OTHERWISE REFUSING TO ACKNOWLEDGE RESPONSIBILITY FOR INJURIES NEGLIGENTLY COMMITTED BY WORK-RELEASE OR OTHER INMATES, VIOLATES PETITIONERS' RIGHTS TO DUE PROCESS.

As is well settled, the remedy available through 42 U.S.C. § 1983 does not create any new rights, but is a means to vindicate an existing or underlying constitutionally-protected right. *Baker v. McCollan,* 443 U.S. 137 (1979). To sustain a claim under § 1983, the plaintiff must show that the defendant, under color of state law, caused a deprivation of recognized constitutional rights. *Screws v. United States,* 325 U.S. 91 (1945). The State of Alabama's statutory policies at issue are clearly matters of state law. Further, there is a manifest deprivation of constitutional rights here, both as to equal protection and due process.

Petitioners do not challenge the constitutionality of the State statutory system for compensating third parties injured by negligent acts of a State employee or agent. Petitioners also do not, per se, challenge the constitutionality of State policy allowing work-release or other inmates to operate State motor vehicles. However, Petitioners contend that equal protection and due process are implicated by the vastly different approaches established by these statutory and other policies for compensating those injured by negligent acts of State employees and by negligent acts of inmates — especially when both negligent acts are identical and both negligent acts are committed by individuals conducting the business of the State, who are following the instructions of State officials, or who are in State custody or control.

It is well established that § 1983 provides a remedy for procedural and substantive due process violations. Whether procedural or substantive due process right is involved, the objective is protection of the individual against arbitrary action of government. *Daniels v. Williams,* 474 U.S. 327 (1986). Here there is arbitrary action in terms of the State policy inexplicably denying insurance coverage for work-release or other inmates, aside from purely financial considerations as a possible rationale. Further, such a policy represents, as well as allows, grossly negligent conduct or action by State officials within the Alabama correctional system, in face of serious and foreseeable harm.

While § 1983 remedies might not be involved in a *simple* negligent conduct of State official causing unintended loss of or injury to life, liberty, or property, "gross negligence" may permit recovery under § 1983. A person "may be said to act in such a way as to trigger a § 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm

will follow." *See Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987).

The situation here well meets that definition. The State, through its policy as well as by the conduct of its correctional officials, allows work-release or other inmates — who (almost by definition) have little if any regard for the injuries they may cause through their own conduct — to operate State vehicles on State roads. Yet the State, almost by direct contrast to the likelihood of harm in such situations which the State itself created, provides no adequate means of compensation for injuries or damages resulting from auto accidents in which these drivers would be at fault.

There is no question that such accidents occur. In fact, the District Court below made note of the fact in its Memorandum Opinion. There is no question that injuries to third parties, including Alabama citizens, result. Thus, there is no question that this conduct and policy poses an "obvious risk," that these correctional officials must be presumed "to have been aware of it," and that "it is highly probable that harm will follow." It is equally beyond question that this entire scenario, leading to such foreseeable results, is a function of State policies and programs. Consequently, a § 1983 remedy is available to Petitioners and all those similarly situated.

In *Nishiyama,* a woman was beaten to death by an inmate who was driving a Tennessee State police vehicle and flagged the victim down as she was travelling on Lafayette Road in Montgomery County. The inmate was a convicted felon operating the patrol car with the permission and authority of the county sheriffs. The inmate used the Sheriff vehicles to perform official and personal tasks for the Sheriff as well as personal tasks for himself.

The *Nishiyama* court, reviewing the subsequent § 1983 action on behalf of the deceased victim, distinguished this Court's decision of *Martinez v. California,* 444 U.S. 277 (1980), in which the Court found that § 1983 was not available as a remedy where a released parolee five months later murdered a 15 year-old girl. This Court determined, among other things, that the action by the parolee was too remote a result to impose § 1983 liability.

The *Nishiyama* court stated that in the situation before it, the victim's death "cannot be viewed as so remote a consequence of the defendants' actions as to automatically preclude liability under section 1983. Through their established practice of entrusting the police car to [the inmate], [the sheriffs] set in motion the specific forces that allowed him to commit his crime."

The court compared other similar instances where liability was not found, and said that in those instances there was not the same "similarly close relationship between the criminal acts and the defendants' acts under color of state law." 814 F.2d at 281, *noting, e.g., Fox v. Custis,* 712 F.2d 84 (4th Cir. 1983) (no constitutional duty to protect public from random criminal violence); *Humann v. Wilson,* 696 F.2d 783 (10th Cir. 1983) (victim's rape too remote a consequence of decision to transfer inmate to minimum security facility) , and *Jones v. Phyfer,* 761 F.2d 642 (11th Cir. 1985) (no special relationship between rape victims and state employees who released rapist).

The *Nishiyama* court found the situation before it to be more than "simple inattention or carelessness." Instead, "the defendants consciously established a policy of allowing trusties to have use of official patrol cars with a seeming indifference to the consequences." The defendants thus "consciously and voluntarily ailed to respond to the danger presented" by such a policy.

More directly, in *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) the court reviewed a § 1983 claim involving a woman abducted and terrorized by members of an inmate work squad. The Eleventh Circuit, in a decision markedly different from its summary affirmance here, found that summary judgment for the defendants was not appropriate.

Distinguishing cases to the contrary, including those from this Court, the Eleventh Circuit remarked [citations and footnotes omitted]:

> These inmates never assumed the status of parolee, releasee, furloughed inmate or unknown assailant. . . . In such cases the remoteness of the defendants' conduct from the actual harm committed by an individual wholly outside of the custody and control of the state is too great to impose liability. However here, although the inmates eventually escaped from the custody of the defendants, at the time of the kidnapping they were still within the defendant's custody and were within the community setting only by virtue of the defendants' actions in bringing them there. * * * [T]his custodial relationship supports a finding that the defendants had the power and authority to direct the inmates' actions. . . . Such power and authority imposes a responsibility upon the state for its own actions.
>
> * * *

> [T]he plaintiff here has presented evidence that the work squad inmates were in the defendants' custody when [the victim] was kidnapped, and that the defendants facilitated the inmates, commission of the crime by their conduct. We find these factors critical in determining whether the plaintiff has established sufficient evidence of the existence of a special danger and concomitant duty under § 1983. As previously discussed, the nature of the defendants' conduct constitutes an important consideration in establishing their duty.

The District Court, granting summary judgment, discounted the effect of this analysis. Nevertheless, as the *Cornelius* court thus indicates, the present situation further constitutes a special relationship or special danger circumstance, permitting — indeed, requiring — government responsibility under § 1983 for actions by a third party causing harm to another. *Compare* this court's decision in *Martinez, supra,* in which it was determined that there was no nexus between the defendant's conduct and the plaintiff's alleged due process violation.

This situation therefore is in contrast to *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989), where a sharply divided Court found that a special relationship did not exist between the Department of Social Services and a child severely beaten by the child's father, even though DSS officials or employees were involved in the ongoing situation and were aware of prior abuse incidents. The Court stated the harm suffered did not occur while the child was in state custody and that the state played no part in creating the dangers faced by the child, nor did anything to render the child more vulnerable to such dangers. The Court said that "nothing in the language of the Due Process Clause itself requires the

State to protect the life, liberty and property of its citizens against invasion by private actors. The clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. The Court indicated that remedies in tort law or legislation would be more appropriate than an action under the Due Process Clause.

Yet, at least in this situation, the injury was committed by an individual *in State custody or control, through State Policy of allowing the individual to make use of State motor vehicles, and with the very distinct Possibility that injuries would be created.* This is significantly more, with respect to the responsibility of the government or agency for the injuries which occurred, within the standards due process protection, than the circumstances in *DeShaney.* Petitioners further suggest that the *DeShaney* circumstances themselves may have been grounds for liability under the due process clause, depending on the nature and involvement of the State actors and the level or extent of their knowledge concerning the foreseeable harm or risk of harm presented by the situation in which they were involved. (*See* Brennan, J., with Marshall and Blackmun, JJ., joining, dissenting in *DeShaney,* and Blackmun, J., dissenting separately.)

Indeed, these defendants, by virtue of State policy as well as their own conduct — as did the defendants in *Nishiyama* and *Cornelius* — directly created the dangerous situation of the inmate's presence on the roadways using a State vehicle (as Petitioners suggested below, like an "unguided missile") and themselves invited the danger which inevitably resulted in the injuries sustained here. In fact, as Petitioners noted below, various correctional offices or facilities have their own rules and regulations concerning inmates' use of vehicles, and in those policies they thus clearly recognize that accidents are likely to result.

This situation also is different than the circumstances addressed by this Court in *Parratt v. Taylor,* 451 U.S. 527 (1981), involving a loss by a inmate of certain hobby materials ordered by mail. The Court found that there was no § 1983 action available because the property deprivation did not occur as the result of an established state procedure, but due to the unauthorized failure of state agents to follow procedure. Here the situation is quite to the contrary — the harm or injury cause is a *direct result* of State officials establishing, and State agents or correctional officers following, *a certain State procedure* allowing work-release or other inmates to operate State vehicles on the open road, and then denying insurance coverage for injuries that result from negligent conduct of these work-release or other inmates under the contention that these individuals are not considered State "employees."

Nor is relief for Respondents mandated by this Court's decision in *Collins v. City of Harker Heights,* 503 U.S. 115 (1992), involving the death by asphyxiation of a sanitary worker who entered a manhole to work on a sewer line. The court found that the Due Process Clause does not impose an independent duty to provide certain minimal levels of safety and security in the workplace. The court stated that the policy choices involved as to worker training and sewer maintenance are not within the boundaries of due process protection or review.

However, the dangerous condition in *Collins* was not created by the State. Here, as Petitioners emphasize, the dangerous condition *is a result of* the State policy and practices. Surely even the limitations of due process recovery as described by this Court cannot be called upon by a State to avoid responsibility for dangers it creates through a policy it establishes and producing injuries that it can foresee.

Respondents did not deny in their pleadings or briefs below that such accidents or injuries are likely to result from such policies. Nor did they deny that such accidents or injuries easily can be avoided by just simply prohibiting the use of State vehicles by work-release or other inmates. Respondents' failure to change the policy in this respect is another effort to save the State money (rather than using a State employee paid at quite a different salary level to do driving done by work-release or other inmates). Again, while governmental frugality is a laudable goal, it pales in comparison to the due process violations here and is in no way a sufficient explanation or justification for such violations.

Further, as this Court clearly stated in *City of Canton v. Harris,* 489 U.S. 378 (1988), involving lack of medical attention as to an arrestee when such attention was quite definitely necessary, a § 1983 action may be available for harm caused by "deliberate indifference" of the State actors to present deprivation of constitutional rights. *See also Farmer v. Brennan,* 511 U.S. __, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) (showing of prison officials subjective awareness of risk of harm may form basis for liability under Eighth Amendment protections).

Again, this most definitely is a situation of such "deliberate indifference" in that the State is well aware of its conduct and its duties in this regard and the likely results of its own policies. To the extent that "deliberate indifference" plays a role in § 1983 recovery here, it certainly is present here.

In fact, liability here is analogous to the responsibility described in Restatement of Torts (2d) § 319: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Under Restatement § 319, liability has been found in situations where injuries are caused

by prisoners or similar circumstances. *See, e.g., Frett v. Government of Virgin Islands,* 839 F.2d 968 (3rd Cir. 1988) (action available under § 1983 by inmate against warden, director of prisons, and government alleging violation of civil rights by failing to take action that would have prevented assault by another inmate); *Gibson v. United States,* 457 F.2d 1391 (3rd Cir. 1972) (injury to Job Corps instructor by Job Corp enrollees); *Payton v. United States,* 636 F.2d 132 (5th Cir. 1981), *on rehearing,* 679 F.2d 475 (5th Cir. 1982) (woman kidnapped, raped, and murdered by parolee, who had been convicted of similar crimes, action under Federal Tort Claims Act available, defendants had duty to public to avoid grossly negligent release of highly dangerous prisoners who may violate law or threaten public welfare); *Durflinger v. Artiles,* 563 F. Supp. 322 (D. Kan. 1983), *aff'd,* 727 F.2d 888 (10th Cir. 1984) (wrongful death action against psychiatrists at state mental facility who approved release of inmate who later killed plaintiff's wife); and *Doe v. United Social and Mental Health Services,* 670 F. Supp. 1121 (D. Conn. 1987) (convicted felon with history of psychiatric problems stabbed woman to death when released on parole, § 1983 action failed, but operators of halfway house did not follow their own criteria in accepting felon and could be found liable for not meeting specific duty to prevent foreseeable harm to those foreseeably subject to risk of injury).

As Petitioners have noted, the District Court found the suggestion of due process violation to merely be an attempt to avoid the effects of sovereign immunity. The ourt further found that the substantive component of due process barring arbitrary or wrongful government actions and preventing the government from engaging in conduct that "shocks the conscience" is not implicated by these circumstances.

Yet this policy should shock the conscience of any court. The State, under the guise of fiscal necessity, is deliberately

allowing injury to occur in the use of State vehicles by work-release or other inmates and, moreover, is deliberately failing to provide compensation for that injury.

The foreseeable risk of harm here is plain. The deliberate indifference of Respondents is likewise clear. The nature of the State policy and its pecuniary objective are not ambiguous. That this State policy *created* the danger and *established* the risk of harm is not in dispute. The special relationship requirement, if any, is definitively met here. In fact, all of the requirements for a showing of due process violation under § 1983 are met. Thus, summary judgment or any similar relief in favor of Respondents was not appropriate.

II.

REFUSING INSURANCE COVERAGE FOR WORK-RELEASE OR OTHER INMATE DRIVERS OR DECLARING WORK-RELEASE OR OTHER INMATES NOT TO BE STATE AGENTS OR EMPLOYEES FOR PURPOSES OF INSURANCE AS TO MOTOR VEHICLE ACCIDENTS VIOLATES PETITIONERS' RIGHTS TO EQUAL PROTECTION.

With respect to a § 1983 remedy, these circumstances also clearly present an equal protection concerns. In fact, it would be difficult to devise a statutory system in which equal protection is more directly denied. Under Alabama law and policy, mere happenstance will decide whether a non-negligent victim of an auto accident in Alabama would receive fair compensation or virtually no compensation for damages and injuries sustained as a result of that accident, depending upon whether the driver at fault was a State employee or a work-release or other inmate.

Indeed, vastly different compensation processes and results are put into motion by two accidents which might occur on the same day and in a similar manner, in two different parts of the State: one in which the driver at fault was an inmate (who supposedly is not a State "employee" due to a statute so declaring), and the other in which the driver at fault was a State employee (perhaps, to add to the irony, a prison guard or official in the State correctional system). The State properly has determined as a matter of State policy that insurance is available for victims of negligence committed by State employees. Yet, inexplicably, as to a similar occurrence involving a work-release or other inmate, where employment relationship factors are no less present — most assuredly the crucial factor of custody or control of the employee — the State has determined as a matter of State policy that almost no compensation is available.

Quite contrary to the conclusions of the District Court here, as affirmed by the Eleventh Circuit, this is a textbook case of an equal protection violation. The State policy effectively establishes a neglected sub-class of victims of negligent conduct committed by work-release or other inmates, which victims are entitled to nothing for general damages or pain and suffering-elements of damages which are by no means diminished simply because the negligent party was not a State "employee." The State policy, further, establishes this sub-class of victims without valid reason sufficient to justify the equal protection violation.

Petitioners acknowledge that these circumstances do not involve a suspect classification or invoke fundamental constitutional rights, for purpose of an equal protection analysis. Thus, the disparity at issue does not violate the right to equal protection if there is a "rational basis" to support it. Petitioners also recognize that, as this Court recently stated in *Federal Communications Commission v. Beach Communications,* 508 U.S. __, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993), at 124 L. Ed. 2d at 221:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification.

Citing, *e.g., Sullivan v. Stroop,* 496 U.S. 478 (1990) and *Bowen v. Gilliard,* 485 U.S. 587 (1987).

This Court continued, in *Beach Communications* [citations omitted]:

> Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to fear antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Citing *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166 (1980) and *Vance v. Bradley,* 440 U.S. 93 (1979).

On a rational basis review, a statutory classification has a

presumption of validity. Those attacking the rationality of a legislative classification, must address every conceivable basis which might support it. And it is irrelevant whether the conceived reason for the challenged distinction actually motivated the legislature. A legislative choice may be based on rational speculation unsupported by evidence or empirical data. *See Lyng v. Automobile Workers,* 485 U.S. 360 (1988); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); and *Vance v. Bradley, supra.*

However, even given these broad standards, equal protection concerns of a constitutional dimension are invoked here. Even given the wide latitude afforded to State action or legislative policy under a rational basis approach, there is no rational basis for a State policy declaring work-release or other inmate to not be employees for insurance purposes, except an effort to save the State of Alabama money at the expense of victims of negligent conduct by such work-release or other inmates — victims who most likely would be Alabama citizens, injured or incurring personal property damage and other harm due to auto accidents where the driver at fault is a work-release or other inmate.

Saving money, as indicated by the State officials in their depositions, noted below by the District Court, appears to be the *sole* basis for this classification that work-release or other inmates are not employees. Nevertheless, while fiscal caution is a commendable principle, the State has a responsibility to its citizens concerning negligent conduct of persons within State authority, custody, control, or employment. The State has so recognized such a responsibility by providing insurance allowing compensation for situations involving harm caused by negligent conduct of State employees.

To say that such harm, even serious harm, caused by a work-release or other inmate cannot be compensated merely as a means of saving money provides a basis for the State statutory scheme, to be sure — but under these circumstances such an explanation is not an adequate rational basis legitimating that distinction, for purposes of an equal protection analysis. Even a rational basis review may result in a conclusion that equal protection has been denied — or the rational basis standard becomes simply rhetoric.

The statutory scheme established by the State of Alabama denying employee status or insurance coverage for situations involving injuries resulting from negligent conduct of work-release or other inmates violates the rights of Petitioners and to all those similarly situated to equal protection. The system has no rational basis, speculative or otherwise. While the statutory classification may be entitled to some presumption of legitimacy, that presumption falls away in light of these circumstances.

Review by this Court of this denial of equal protection is eminently warranted. The State of Alabama must be required to treat in the same way similar injuries and damage caused by similar negligent conduct committed by similar persons in State employment, custody or control.

Summary judgment under Federal Rule of Civil Procedure 56 is available only when there are no disputes as to material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986). Here, to the extent there are any material facts in dispute, summary judgment was not available to Respondents.

More precisely, however, the District Court should not as a matter of law entered judgment in favor of Respondents, nor should the Eleventh Circuit have affirmed. Review by this Court

is warranted of the State of Alabama's policy in the context of prevailing standards for recovery under § 1983 for deprivations of the right to due process guaranteed by the Constitution to Petitioners and to all those similarly situated.

CONCLUSION

Therefore, Petitioners Pettco Enterprises, Inc. *et al.*, for reasons stated, respectfully request of this Court that it grant their Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

M. JACK HOLLINGSWORTH
Counsel of Record
M. JACK HOLLINGSWORTH
AND ASSOCIATES, P.C.
Attorneys for Petitioners
15 South 20th Street
Suite 110
Birmingham, Alabama 35233
(205) 323-2226

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 20, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

95-6773

D.C. Docket No. CV-94-A-240-N

PETTCO ENTERPRISES, INC.; LARRY B. PETTY,

Plaintiffs-Appellants,

versus

JAMES C. WHITE, SR. et al.,

Defendants-Appellees,

MIKE WEAVER, individually and as Commissioner of the Ins. Dept. of the State of Alabama,

Defendant.

Appeal from the United States District Court
for the Middle District of Alabama

(September 20, 1996)

Before EDMONDSON and DUBINA, Circuit Judges, and FARRIS*, Senior Circuit Judge.

---

* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix A

PERCURIAM:

AFFIRMED. ***See*** **11th Cir. R. 36-1.**

"Costs taxed against plaintiffs-appellants."

Judgment Entered: September 20, 1996

For the Court Miguel J. Cortez, Clerk

s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 10/21/96

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION FILED AUGUST 18, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 94-A-240-N

PETTCO ENTERPRISES, INC., et al.,

Plaintiffs,

v.

JAMES C. WHITE, SR., et al.,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This cause is now before the court on Motions for Summary Judgment filed by defendants on June 12, 1995. James C. White, Sr. ("White"), Director of the Finance Department of the State of Alabama, filed one of the motions. The remaining defendants, who all are in some way associated with the Department of Corrections, filed their own motion. The court finds that the Motions for Summary Judgment are due to be GRANTED.

Appendix B

II. PROCEDURAL HISTORY

Plaintiffs, Pettco Enterprises, Inc. ("Pettco") and Larry B. Petty ("Petty") filed a class action complaint in this court on March 1, 1994. Plaintiffs named several defendants.[1] Plaintiffs sought both punitive and compensatory damages, as well as

---

1. Plaintiffs have named the following individuals as defendants: **Tommy Herring** ("Herring"), Commissioner of the Corrections Department for the State of Alabama; **Ron Sutton** ("Sutton"), Associate Commissioner of the Corrections Department of the State of Alabama; **Roy Hightower** ("Hightower"), Regional Coordinator for the Work Release Program of the Corrections Department of the State of Alabama; **Willis Johnson** ("Johnson"), Regional Coordinator for the Work Release Program of the Corrections Department of the State of Alabama; **Randall Lucas** ("Lucas"), Director of the Childersburg Community Work Center; **Jerry L. Ferrell** ("Ferrell"), Director of the Loxley Community Work Center; **M. J. Thurman** ("Thurman"), Director of the Alex City Work Release Center; **Ronald Weaver** ("Weaver"), Director of the Atmore Work Release Center; **Pat Halliday** ("Halliday"), Director of the Birmingham Work Release Center; **Leon Forniss** ("Forniss"), Director of the Camden Work Release Center; **Billy Mitchem** ("Mitchum"), Director of the Decatur Work Release Center; **Glen Newton** ("Newton"), Director of the East Thomas Work Release Center; **Edward Gullion** ("Gullion"), Director of the Elba Work Release Center; **Billy Owen** ("Owen"), Director of the Hamilton Work Release Center; **James E. Reynolds** ("Reynolds"), Director of the Director of the Mobile Work Release Center; and **Richard Baker** ("Baker"), Assistant Director of the Montgomery Work Release Center. Each is sued both in their individual and in their official capacities. The court will refer to these defendants collectively as the "Corrections Defendants."

In addition to the named defendants, the plaintiffs claim against "those individuals who have defined, implemented, and carried out the policies, customs, practices and procedures that allow State inmates in the custody and control of the Department of Corrections of the State of Alabama, to drive State-owned vehicles on the public roads of Alabama without affording

(Cont'd)

declaratory and injunctive relief. This complaint characterized the suit as seeking redress pursuant to 42 U.S.C. § 1983 for deprivations of plaintiffs' Fifth and Fourteenth Amendment rights by defendants under color of state law. The jurisdictional basis for bringing the suit in federal court was 28 U.S.C. §§ 1331 and 1343(3). Plaintiffs purportedly brought the action on behalf of themselves and all members of a class composed of all individuals, partnerships, corporations, or other entities who have suffered injury or property damage as a result of motor vehicle accidents involving State-owned vehicles driven by uninsured prisoners, trustees or inmates on work release programs (hereinafter "inmates").[2] In addition to White and the Corrections Defendants, the original complaint named Mike Weaver ("Weaver"), Commissioner of the Insurance Department of the State of Alabama as a defendant.

Weaver, the Commissioner of Insurance, brought a Motion for Summary Judgment on July 26, 1994. This court granted the Motion for Summary Judgment filed by Weaver individually and as Commissioner of the Insurance Department of the State of Alabama in early September 1994. The remaining defendants moved for summary judgment in July, 1994 by raising such issues as Eleventh Amendment immunity and qualified immunity. This Motion for Summary Judgment was denied as

---

(Cont'd)
them the same coverage provided to all other agents and employees of the State of Alabama as set forth under § 36-1-6 and § 36-1-6.1, Alabama Code (1975) for the protection of the general public." SAC ¶ III.

2. The complaint charges that inmates, trustees, work release prisoners and other prisoners operated the vehicles, but this court will refer to any such individual as an inmate for simplicity's sake.

moot in light of the numerous changes made in Plaintiffs' Amended Complaint.

On August 26, 1994, plaintiffs submitted a Brief in Support of Case Proceeding as a Class Action. Plaintiffs sought class certification under Fed. R. Civ. P. 23(a) and 23(b)(2).On September 9, 1994, the court held an evidentiary hearing and oral argument on class certification. At the direction of the court, the plaintiffs submitted supplemental briefs on the class certification issue on September 19, 1994. On this same date, pursuant to leave of court granted on September 9, plaintiffs filed an Amended Complaint. The Amended Complaint varied in two significant ways from the original complaint. In the Amended Complaint, plaintiffs asked for declaratory and injunctive relief, but not for damages. Plaintiffs also changed the denomination of the type of class treatment which they were seeking. The Amended Complaint and supplemental briefs in support of class certification seek certification of the case only as a Rule 23(b)(1)(A) class action.

On December 22, 1994, this court issued a Memorandum Opinion and order denying plaintiffs' request for class certification under Fed. R. Civ. P. 23(b)(1)(A). Plaintiffs sought reconsideration of that decision. In the alternative, plaintiffs sought permission to amend their complaint again and to seek certification of the class as a Rule 23(b)(1)(B) or a Rule 23(b)(2) class action. On May 23, 1995, this court granted plaintiffs' motion to amend their complaint, denied their motion to set aside the refusal to certify the class under Federal Rule of Civil Procedure 23(b)(1)(A), and certified a class under Rule 23(b)(2).

According to the Second Amended Complaint ("SAC"), the plaintiffs are Pettco, Petty and "all individuals, partnerships,

corporations, or any other person within the meaning of the Equal Protection and Due Process of Law clauses, and any 'other person' for 1983 claims." SAC ¶ II. The SAC defines the class as

> all individuals, partnerships, corporations, or any "other persons" afforded constitutional protection under the rights of Equal Protection and Due Process of Law clauses **who have suffered** personal injury and/or property damage arising out of the negligent or wrongful acts and omissions committed by an inmate driving a State-owned vehicle while in the custody or control of the Department of Corrections for the State of Alabama.

SAC ¶ V (emphasis added). Additionally, the SAC defines the class to include

> all individuals, partnerships, corporations, or any "other persons" afforded constitutional protection under the rights of Equal Protection and Due Process of Law clauses **who will suffer** personal injury and/or property damage arising out of the negligent or wrongful acts and omissions committed as long as the Defendants allow inmates to operate State-owned vehicles while those inmates are in the custody or control of the Department of Corrections for the State of Alabama.

SAC ¶ V (emphasis added).

The SAC alleges that defendants, acting either separately or in concert, acted under color of State law and deprived plaintiffs of various constitutional rights under the Equal Protection and Due Process of Law clauses in Fifth and Fourteenth Amendments. The defendants allegedly authorized inmates to operate vehicles owned by the State of Alabama. Plaintiff further alleges that although defendants knew that the inmates were judgment proof, defendants allowed the inmates to drive these vehicles without insurance.

Moreover, plaintiffs allege that defendants have created a system of remuneration for persons injured as a result of accidents involving vehicles owned by the State of Alabama which is arbitrary and capricious and which allows for deprivation of individual property rights without Due Process of Law or Equal Protection of the Law;[3] that the actions of the defendants were deliberately indifferent to plaintiffs' constitutional rights; and that the acts of defendants have caused plaintiffs to lose large sums of money for personal injuries and property damage caused by the prisoners.

Plaintiffs seek a declaration of their rights and an injunction which prevents defendants from denying that inmates operating State-owned vehicles are "agents" or "employees" for purposes of §§ 36-1-6 and 36-1-6.1 of the Alabama Code. Plaintiffs seek an injunction against the defendants which will require defendants to extend to plaintiffs the same benefits and protection

---

3. Plaintiffs claims for alleged violations of their Due Process Clause rights are contained in Count One. Plaintiffs claims for alleged violations of their Equal Protection Clause rights are contained in Count Two.

they would receive if they had been in an accident involving a non-prisoner employee or agent of the State of Alabama. Plaintiffs no longer seek damages. Plaintiffs ask for attorneys' fees under 42 U.S.C. § 1988.

III. FACTS

The court has carefully considered all affidavits, deposition excerpts, and documents submitted in support of and in opposition to the motions. The submissions, viewed in the light most favorable to the non-movant, establish the following facts:

It is undisputed that the State of Alabama allows and authorizes inmates, even those without any insurance, to operate State-owned vehicles on Alabama roads. In his deposition, Herring testified that when he became Commissioner of the Department of Corrections in 1977, it was then, and continued to be, the policy and procedure of the Department of Corrections to allow inmates to drive State-owned vehicles. (Herring Dep. at 8). There are no uniform rules governing inmates who operate State-owned vehicles, rather each correctional facility seems to promulgate its own set of rules. (Herring Dep. at 8-13; Ptf. Exs. B, C, & E). It is also undisputed that these inmates have been involved in traffic accidents which caused property damage or personal injury. (Herring Dep. at 14; Ptf. Ex. F; Def. Ex. 2; Spillars Dep. Ex. 1).

In June of 1993, a Department of Corrections van driven by an inmate hit the back of a vehicle owned by Pettco and operated by Petty. (Def. Ex. 2). Pettco filed a claim with the State Board of Adjustment seeking $757.00 for uninsured dental expenses incurred by Petty as a result of the accident, $2557.83 for damages to personal property, $952.14 for other damages,

and interest of $1.00 daily from 6/25/93 until satisfaction. (Def. Ex. 2). It is undisputed that Pettcols vehicle was covered by an insurance policy issued by Aetna Casualty & Surety and that Pettco had not filed a claim under that policy at the time it filed the claim with the Board of Adjustment. (Def. Ex. 2).

Apparently, the State requires all claims against the Department of Corrections to be filed with the Board of Adjustment.[4] (Herring Dep. at 26). When a claim is filed against the Department of Corrections with the Board of Adjustment, the Department of Corrections files a response to such claim and makes a recommendation as to payment. (Def. Ex. 3). The Board of Adjustment then makes a determination of what it will be pay on the claim. (Def. Ex. 3). There have been many claims where the Department of Corrections recommended payment, but the Board of Adjustment denied payment. (Def. Ex. 3). On the other hand, there have been instances where the Department of Corrections has denied liability for the claims and recommended that no payment be made, and the Board of Adjustment has authorized payment anyway. (Def. Ex. 3). Plaintiffs contend that the Board of Adjustment pays a party injured by an inmate driver in an automobile accident less than the injured party would be able to recover if the driver had been a State employee covered by liability insurance made available by the State.

---

4. In his affidavit, Ronald E. Jones ("Jones"), the Commissioner for the Alabama Department of Corrections, states that the Department of Corrections is an agency of the State of Alabama which is totally separate from the Department of Finance and the Board of Adjustment. (Def. Ex. 3). The Department of Corrections has no control or authority over the Department of Finance or the Board of Adjustment. (Def. Ex. 3).

Appendix B

According to the deposition testimony of Ben Spillers ("Spillers"), the Director of the Risk Management Division of the Department of Finance, claims by a member of the public against the Department of Corrections for harm caused in accidents wherein an inmate driver negligently injures that person are not covered by the State insurance because the inmate is not an agent or employee of the State of Alabama and not covered under the General Liability Trust Fund. (Spillars Dep. at 27-30). Beginning in October of 1992, the State of Alabama began a program and broadened the General Liability Trust Fund guidelines to cover auto liability of State employees acting in the scope of their employment. (Spillars Dep. at 39). The General Liability Trust Fund, which provides insurance for the State, does not usually insure specific vehicles, rather it insures drivers. (Spillars Dep. at 57). For example, a State agency will submit a list of employees who will be driving certain State-owned vehicles and the insurance covers them, not the vehicles themselves. (Spillars Dep. at 58-59). Because inmates are not employees or agents of the State, Spillars would reject any claim submitted for money from the General Liability Trust Fund which involved a State-owned vehicle driven by an inmate. (Spillars Dep. at 33).

IV. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex. Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the

basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the non-moving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-23.

Once the moving party has met its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial.' " *Id.* at 324. To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec.Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). On the other hand, a court ruling on a motion for summary judgment must believe the evidence of the non-movant and must draw all justifiable inferences from the evidence in the non-moving party's favor. *Anderson v. Libery Lobby, Inc.*, 477 U.S. 242, 255 (1986).

After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See,* Fed. R. Civ. P. 56(c).

Appendix B

V. DISCUSSION

A. The Statutory Context

The plaintiffs challenge the system that the State of Alabama employs in determining whether and how much money should be allotted to reimburse individuals who have the misfortune of being involved in an automobile accident with a State-owned vehicle. As a preliminary matter, the court notes that various portions of the Alabama Code are implicated by the issues in this case.

The Alabama Code provides that

> State inmates shall be employed at such labor, in such places and under such regulations within the state as may be determined by the department of corrections.... The department of corrections is authorized to direct inmates to work at any labor and at any site except as provided otherwise by law.

Ala. Code §14-3-47(a) (1975). Thus, the practice of using inmates to drive State-owned vehicles is authorized by statute. Moreover, the Alabama Code explicitly authorizes the Board of Corrections to adopt regulations and policies permitting the Commissioner of the Board of Corrections to extend the limits of the place of confinement of an inmate by authorizing the inmate to leave a State correctional institution for the purpose of working. Ala. Code § 14-8-2 (1975). In certain circumstances, the Alabama Code also authorizes inmates to leave a State correction institution for the purpose of seeking employment or future housing or participating in certain educational programs.

Appendix B

Ala. Code §§ 14-8-61 & 14-8-62 (1975). In either case, Alabama law clearly provides that

> [n]o inmate granted privileges under the provisions of this article shall be deemed to be an agent, employee or involuntary servant of the board [of corrections] while involved in the free community or while going to and from employment, or other specified areas.

Ala. Code §§ 14-8-5 & 14-8-40 (1975).

Although Alabama law does not require that the owners and operators of motor vehicles carry liability insurance, it does provide a mechanism by which State employees who operate motor vehicles in the performance of their duties may acquire insurance and receive reimbursement from the State department, agency, bureau, or division for which they work for the actual cost of the coverage. Ala. Code § 36-1-6 (1975). Additionally, the State provides some insurance coverage for negligent, wrongful acts of State employees or agents. Ala. Code § 36-1-6.1 (1975). This section provides that

> [t]he various state agencies, departments, boards or commissions shall determine and report their needs for liability coverage to the finance director, the insurance commissioner, and the attorney general. The finance director, with the advice of the insurance commissioner and attorney general, shall then determine the type of blanket policy needed to provide basic coverage for deaths, injuries, or damages arising out of the

> negligent or wrongful acts or omissions committed by state employees or agents of the state, including individuals serving as foster parents . . . [or foster care providers] . . . , while in the performance of their official duties in the line and scope of their employment or duties as foster parents or foster care providers. Any policy of insurance or reinsurance shall be selected by the finance director on a competitive bid basis. . . .

Ala. Code § 36-1-6.1(a) (1975). In addition to authorizing the purchase of insurance, the Alabama Code Provides that the finance director, with the advice of the insurance commissioner and the attorney general, may provide for self-insurance of the entire State or any part of the State. Ala. Code § 36-1-6.1(b) (1975).

B. Merits of the Motions for Summary Judgment

Plaintiffs bring this suit pursuant to 42 U.S.C. § 1983. Section 1983 provides a private cause of action for persons whose rights under the federal constitution or laws have been violated under color of state law. *See* 42 U.S.C. § 1983. In order to establish a claim under Section 1983, plaintiffs must prove that the defendants acted under the cloak of state authority when they took the alleged actions against plaintiffs and that the actions deprived plaintiffs of a right or rights secured by the Constitution or by federal law. Thus, Section 1983 is not a source of rights, rather it is a means of vindicating federal rights. *Albright v. Oliver,* 114 S. Ct. 807, 811 (1994).

When a court begins to analyze a Section 1983 claim, it

must first "identify the specific constitutional right allegedly infringed." *Id.* Whether a constitutional violation has occurred can only be determined by applying the standards applicable to that particular constitutional provision. *See, Graham v. Connor,* 490 U.S. 386, 394 (1989). Plaintiffs contend that their rights to Due Process and their rights to Equal Protection of the laws have been infringed. The court will examine each of these claims separately.

1. Equal Protection Claims

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. "Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Hodel v. Indiana,* 452 U.S. 314, 331 (1981) (citations omitted).

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some

> inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). More recently the Supreme Court has explained that

> [w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude, Legislatures may implement their program step by step in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither

> affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (citations omitted).

Plaintiffs contend that it is a denial of equal protection for the State to provide automobile liability insurance for its agents and employees who drive State-owned vehicles and to then allow inmates, who are by statutory definition not agents or employees, to drive State-owned vehicles without providing them with insurance. The persons who are allegedly denied equal protection are the plaintiffs who are injured or damaged by an inmate driving a State-owned vehicle without insurance. Plaintiffs point out that they could look to liability insurance coverage if the vehicle had been driven by someone other than an inmate, while with an inmate driver they are relegated to a Board of Adjustment claim which is much more restrictive than liability insurance as to recoverable damages. Therefore, plaintiffs argue, their rights to equal protection should require the State to either insure inmate drivers or prohibit inmates from driving State-owned vehicles.

Plaintiffs do not contend, nor does this court find, that the scheme set up by Alabama law involves any suspect classification or fundamental right. What "discrimination" may exist is not invidious; the Alabama statutory provisions and the decisions of the State agencies implementing them are rationally related to the State's legitimate interest in saving money and

allocating scarce State resources efficiently. Plaintiffs devote a substantial portion of their brief in opposition to the Motions for Summary Judgment to discussing the reason that Alabama has made such a decision. In the words of the plaintiffs, "there is only one answer, and one answer only, and that is money." By their own arguments, plaintiffs acknowledge the State's legitimate interest and the connection between the challenged practices and that interest.

Plaintiffs are quick to point out that they are not arguing that Alabama Code §§ 36-1-6 or 36-1-6.1, which authorize liability insurance for State agents and employees, are unconstitutional, nor do they contend that the establishment of a Board of Adjustment is unconstitutional. Plaintiffs further assert that there is actually no legislative decision at issue in the case. The court notes that policy decisions made by State officials are analyzed in the same fashion as "legislative decisions." *See Silver v. Baggiano,* 804 F.2d 1211, 1213, 1218 (11th Cir. 1986) (finding that policy of the Commissioner of the Alabama Medicaid Agency and the Attorney General of Alabama denying Medicaid reimbursement to podiatrists while at the same time reimbursing medical doctors for podiatric services did not violate the Equal Protection Clause.) Moreover, plaintiffs' arguments implicitly challenge the legislative decisions embodied in other sections of the Alabama Code which allow inmate labor, at least to the extent that these legislative decisions authorize inmates to drive State-owned vehicles. Most plainly, plaintiffs' theory of the case is that these inmates must be agents or employees of the State of Alabama, and this directly contravenes the section of the Alabama Code which states that they are not.

Plaintiffs would have this court consider the case as one

involving an arbitrary decision by officials of the State. Specifically, they point to what they characterize as the State's arbitrary decision to allow inmates to drive State-owned vehicles. Plaintiffs fail to cite any case that supports their contention that such a decision amounts to a deprivation of rights protected by the Equal Protection Clause of the Fourteenth Amendment. Moreover, the court finds that it is clear that this is not an arbitrary decision. It is a decision authorized by State law and rationally-related to the goal of saving the State of Alabama money. Thus, the defendants have not violated plaintiffs' rights to Equal Protection of the laws by making a decision that it would be too costly to either do without inmate labor being able to drive State-owned vehicles or to provide insurance for inmate drivers.

2. Due Process Claims

Plaintiffs contend that the decisions made by the defendants not to provide insurance coverage for inmates who drive State-owned vehicles amounts to a deprivation of their substantive due process rights. In essence, plaintiffs contend that the State should not be allowed to use inmates as drivers of the vehicles unless it also makes a means of recovery available to members of the citizenry who are injured or suffer property damage in accidents caused by the negligence of such inmate drivers. The State action which is alleged to have caused plaintiffs' constitutional deprivation is not the inmate's negligent driving of the vehicles. Rather, plaintiffs contend that the state's policy decisions not to acknowledge that the inmate drivers are agents or employees of the State and provide them with insurance are the cause of the deprivation. Plaintiffs contend that the defendants should recognize that the inmate drivers are agents or employees despite the fact that such an acknowledgment is

contrary to State law. Plaintiffs assert that the facts of the instant case are sufficiently analogous to the facts of cases where courts have held State actors liable for the intentional acts of third parties to require this court to find State liability. This court does not agree.

If an employee or agent of a company negligently injures a person in a automobile accident, the person can seek recovery for personal injury and property damage by suing the company under Alabama tort law. Alabama's Constitution provides that the State cannot be made a defendant in such a suit.[5] With the protection of this immunity, Alabama could decide not to provide insurance coverage for any State-owned vehicle or any driver operating a State-owned vehicle.[6] Alabama has made a policy decision to allocate its resources in such a way that provides insurance so that there will be money available to recompense accident victims in some circumstances; however, Alabama has not decided to provide a source of recovery for all victims of accidents which were caused by drivers of State-owned vehicles. As previously discussed, this court finds that this policy decision is not an arbitrary one.

What the plaintiffs in this action really want is to be given money to pay for the property damage and personal injuries that they suffered as a result of their automobile accidents. The

---

5.While this state sovereign immunity doctrine does not prevent this court from hearing a suit against the state, the Eleventh Amendment does prohibit this court from exercising jurisdiction over a suit against a state instrumentality or agency for damages.

6. Such a decision would not be contrary to Alabama law which does not require drivers or owners to insure their motor vehicles.

real impediment to this recovery is the doctrine of sovereign immunity and the Eleventh Amendment.[7] Knowing that any challenge against such a well-established principle as sovereign immunity would be in vain, plaintiffs have launched a collateral attack on the State's policy decisions regarding whether and when to voluntarily provide insurance coverage. Despite plaintiffs' assertions to the contrary, this suit does not state a claim for a deprivation by the State of rights secured to the plaintiffs by the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. This phrase has been understood to encompass both a procedural and a substantive element. *See Planned Parenthood of Southeastern Pennsylvania v. Casey,* 112 S. Ct. 2791, 2804 (1992). The procedural element, which is not at issue here, guarantees that a State may not effect a deprivation of life, liberty, or property without certain procedural safeguards. The substantive element of the clause has a twofold interpretation. First, a plaintiff may bring suit under Section 1983 to obtain a remedy for a State official's violation of the rights protected by the Bill of Rights, such as the right to freedom of speech or freedom from unreasonable searches and seizures. *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). Thus, the clause selectively incorporates provisions of the Bill of Rights and protects these rights from infringement by State and local governments. "Second, the Due Process

---

7. Another practical obstacle is that plaintiffs have dropped all claims for damages in this suit, even the claims not prohibited by the Eleventh Amendment.

Clause contains a substantive component that bars certain arbitary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). This substantive element of the clause "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952).

Although the Supreme Court has extended substantive due process protection to certain unenumerated rights, it has not extended Fourteenth Amendment coverage to a host of other areas. In fact,

> the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992) (citation omitted). Areas in which substantive rights are created only by State law (as is the case with **tort law** and public employment law) are not subject to substantive due process protection under the Due Process Clause because "substantive due process rights are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring). As a result, these State law based rights constitutionally may be rescinded so long

as the elements of procedural — not substantive — due process are observed.

Not long ago the Supreme Court examined the strictures of substantive due process in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989). Prior to *DeShaney,* federal circuit courts were divided over the issue of when, if ever, the failure of State or local governmental authorities to provide an individual with adequate protection from the actions of third parties exposed the State or local governmental authorities to liability. In *DeShaney,* a mother, on behalf of her infant son, brought an action pursuant to Section 1983 against social workers alleging that they had deprived her son of his liberty interest in bodily integrity in violation of his substantive due process rights under the Fourteenth Amendment. *Id.* at 191. The boy had been so severely and repeatedly beaten by his father that he had become mentally retarded. *Id.* at 193. For more than a year, the social workers had received reports of abuse from various sources and had taken limited steps to address the abuse, but they had not removed him from his father's home. *Id.* at 192-93. The mother alleged that the social workers, because they should have been or actually were aware of the danger to the child, had a constitutional duty to intervene to protect him from his father. *Id.* at 193.

The Supreme Court addressed the mother's claims by explaining that

> nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power

> to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

489 U.S. at 195-96 (internal citations omitted). Thus, the Supreme Court recognized that the Due Process Clause does not confer an "affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. Moreover, the Supreme Court opined that

> [i]f the Due Process Clause does not require the State to provide it citizens with particular protective services, it follows that the State cannot be held liable under the Clause for

> injuries that could have been averted had it chosen to provide them. As a general matter, then we concluded that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id. at 196-97.

The Court in *DeShaney* next addressed the mother's contention that a special relationship existed in the case because the State knew that the child faced a special danger of abuse at his fathers hands and proclaimed, by word or by deed, its intention to protect the child against that special danger. *Id.* at 197. The court characterized this argument as a contention that the State acquired an affirmative duty by undertaking the protection of the child and that its failure to discharge that duty in a reasonably competent fashion was an abuse of governmental power that shocked the conscience and constituted a substantive due process violation. *Id.* The court rejected this approach by explaining that while the Constitution imposes upon the State affirmative duties of care and protection, it does so only in cases where the State has affirmatively acted to restrain the individuals freedom to act on his own behalf through incarceration, institutionalization, or other similar restraint on personal liberty. *Id.* at 200. Thus, the court concluded that the *DeShaney* plaintiff had failed to articulate a viable theory to support her claim that the social worker's actions amounted to a violation of rights protected by the Fourteenth Amendment Due Process Clause.

Defendants argue that this case does not involve a violation of the Due Process Clause. The court agrees. Given that this

case does not state a claim for a Due Process violation in a recognizable form, it is easier to explain what it is not rather than what it is. Plaintiffs do not argue that they have been denied procedural due process, rather they contend that the defendants' policies amount to a violation of their rights to substantive due process. The court finds that this case is not one which implicates the type of substantive due process violation which can arise from the interference with a fundamental right. Plaintiffs have not articulated, nor can this court envision, how the actions of the defendants constitute State action that shocks the conscience or interferes with rights implicit in the concept of ordered liberty by exercising its right to employ inmate labor, its privilege to not provide insurance coverage, and its decision to not reimburse victims of the negligent behavior of the inmates except through Board of Adjustment proceedings. The conduct of the defendants is neither arbitrary nor conscience shocking.

Plaintiffs urge this court to find that this suit states a claim for a substantive due process violation that is akin to the one addressed by the Eleventh Circuit in *Cornelius v. Town of Highland Lake,* 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 494 U.S. 1066 (1990). The *Cornelius* case is one of many cases which addresses the liability of State actors for torts or crimes committed by inmates.[8] The court notes that several panels of

8. The facts of the Cornelius case are as follows. The Mayor of the Town of Highland Lake requested that the Department of Corrections provide the city with inmate labor for general maintenance and public works purposes. *Cornelius,* 880 F.2d at 349. The St. Clair Correctional Facility provided some inmates to perform the labor. *Id.* An unarmed civilian supervised the inmates while they worked. *Id.* at 350. While they were working, the inmates had access to axes, picks, machetes, knives, and saws, *Id.* Two of these inmates abducted, at knife point, the plaintiff, an employee of Highland Lake whose job required her to work the where the inmates were. The inmates terrorized

(Cont'd)

the Eleventh Circuit have recently questioned the continued vitality of the *Cornelius* decision. *See, e.g., Lovins v. Lee*, 53 F.3d 1208, 1211 (11th Cir. 1995); *Wooten v. Campbell*, 49 F.3d 696, 700 n.4 (11th Cir. 1995); *Wright v. Lovin*, 32 F.3d 538, 541 n.1 (11th Cir. 1994). Even assuming that the *Cornelius* case is still good law, the court finds that it is inapposite.[9]

In *Cornelius* the Eleventh Circuit reversed a district court which had granted summary judgment to the defendants in a suit against a municipality, its mayor, the Alabama Department of Corrections, and other defendants by finding that the defendants owed the plaintiff no duty under Section 1983 to protect her from the criminal actions of the work squad inmates because no special relationship existed between the plaintiff and either the defendants or the inmates. *Cornelius*, 880 F.2d at 351, 359. The Eleventh Circuit held that under the "special relationship analysis" a private citizen may hold a government official liable under Section 1983 for deprivations by a third party of the private citizen's due process rights when a special relationship is found to exist between the victim and the third party or between the victim and the government official. *Id.* at 352-53.

> When the duty which arises by virtue of the special relationship is coupled with some degree of culpable conduct on the defendant's

---

(Cont'd)
plaintiff for days. *Id.* Plaintiff sued various officials pursuant to Section 1983 alleging deliberate indifference in violation of her constitutionally protected liberty interests under the Fourteenth Amendment. *Id.* at 350-51.

9. Plaintiffs also cite *Nishivama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987). This case is factually analogous to *Cornelius*, and consequently, it is also irrelevant to the instant suit.

> part, § 1983 liability attaches. However, absent the relationship, "the due process clause of the Constitution does not protect a member of the public at large from the criminal acts of a third person, even though the state was remiss in allowing the third person to be in a position in which he might cause harm to a member of the public. . . ."

Id. at 353 (citation omitted). The *Cornelius* opinion goes on to describe an alterative way to create a duty that can subject the government official to liability for the actions of a third party in situations where the plaintiff faces a "special danger." *Id.* at 354-55.

What *Cornelius* most clearly establishes is that in certain circumstances a government official may be held liable for damages to a plaintiff suing under Section 1983 because a third person violated her constitutional rights. But for the concept of sovereign immunity and the strictures of the Eleventh Amendment, plaintiffs could use these cases to argue that the State officials whom they have named as defendants in this case must be liable for injuries caused by the actions of the inmates. This court finds that no tortured reading of *Cornelius* or *Nishiyama* compels this court to find that the State of Alabama or its officials must accept responsibility for the negligent conduct of the inmates that drive State-owned vehicles by extending insurance coverage to these drivers or else violate the due process rights of any citizen who may encounter such a driver in an accident of an Alabama highway.

Appendix B

VI. CONCLUSION

Plaintiffs complain that if the State van which ran into the rear of their vehicle had been driven by a State employee or agent they would have been able to recover their full damages from State provided liability insurance. Since, however, the State van was driven by an inmate, they were restricted to a claim before the Board of Adjustment, where their recovery was greatly restricted. At best, this is an inequitable situation to be remedied by State legislation. It does not rise to the level of a violation of the United States constitution.

In light of the aforementioned findings of this court, the court need not and does not reach the other bases proffered by the defendants in support of their Motions for Summary Judgment. For the reasons stated above, the court finds that the Motions for Summary Judgment of all remaining defendants are due to be GRANTED. A separate order will be entered in accordance with this Memorandum Opinion.

DONE this 18th day of August, 1995.

s/ W. Harold Albritton
W. Harold Albritton
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 94-A-240-N

PETTCO ENTERPRISES, INC., et al.,

Plaintiffs

v.

JAMES C. WHITE, SR., et al.,

Defendants

ORDER

Pursuant to the Memorandum Opinion entered by the court on this day, it is hereby ORDERED as follows:

1. Defendants' Motions for Summary Judgment are GRANTED, and judgment is entered in favor of the defendants on both Counts of the Second Amended Complaint.

2. Costs are taxed against the plaintiffs.

DONE this 18th day of August, 1995.

s/ W. Harold Albritton
W. Harold Albritton
UNITED STATES DISTRICT JUDGE

APPENDIX C — SECOND AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CASE NO. CV-94-A-240-N

PETTCO ENTERPRISES, INC., et al.,

PLAINTIFFS,

VS.

JAMES WHITE, et al.,

DEFENDANTS.

SECOND AMENDED COMPLAINT

Come now the Plaintiffs, Pettco Enterprises, Inc. and Larry B. Petty, and all others similarly situated and amend their Complaint as follows:

Jurisdiction

I.

The jurisdiction of this Court arises under 28 U.S.C. §1331, 42 U.S.C. §1983 and 28 U.S.C. §1343(3), this being an action authorized by law to redress deprivation under color of state law, the statute and ordinance, regulation, custom, practice, or usage of a right guaranteed under Equal Protection and Due Process of Law clauses under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Appendix C

Parties

II.

The Plaintiffs are Pettco Enterprises, Inc., Larry B. Petty; as well as all individuals, partnerships, corporations, or any other person within the meaning of the Equal Protection and Due Process of Law Clauses, and any "other person" for §1983 claims.

III.

The Defendants in this action are JAMES C. WHITE, SR., individually and as Director of the Finance Department of the State of Alabama; TOMMY HERRING, individually and as Commissioner of the Department of Corrections of the State of Alabama; RON SUTTON, individually and as Associate Commissioner of the Department of Corrections of the State of Alabama; ROY HIGHTOWER, individually and as Regional Coordinator of the Work Release Program of the Department of Corrections of the State of Alabama; WILLIE JOHNSON, individually and as Regional Coordinator of the Work Release Program of the Department of Corrections of the State of Alabama; RANDALL LUCAS, individually and as Director of the Childersburg Community Work Center; JERRY L. FERRELL, individually and as Director of the Loxley Community Work Center; M.J. THURMAN, individually and as Director of the Alex City Work Release Center; RONALD WEAVER, individually and as Director of the Atmore Work Release Center; PAT HALLIDAY, individually and as Director of the Birmingham Work Release Center; LEON FORNISS, individually and as Director of the Camden Work Release Center; BILLY MITCHEM, individually and as Director of the Decatur

Appendix C

Work Release Center; GLEN NEWTON, individually and as Director of the East Thomas Work Release Center; EDWARD GULLION, individually and as Director of the Elba Work Release Center; BILLY OWEN, individually and as Director of the Hamilton Work Release Center; JAMES E. REYNOLDS, individually and as Director of the Mobile Work Release Center; RICHARD BAKER, individually and as Assistant Director of the Montgomery Work Release Center; as well as those individuals who have defined, implemented, and carried out the policies, customs, practices, and procedures that allow State inmates in the custody and control of the Department of Corrections of the State of Alabama, to drive State-owned vehicles on the public roads of Alabama without affording them the same liability coverage provided to all other agents and employees of the State of Alabama as set forth under §36-1-6 and §36-1-6.1, Alabama Code (1975) for the protection of the general public.

Class Action Allegations

IV.

This action is brought by Plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Fed.R.Civ.P.23(a) and 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2), for the relief herein set forth.

V.

A. The class so represented by Plaintiffs in this action, and of which Plaintiffs are themselves members, consist of all individuals, partnerships, corporations, or any "other persons" afforded constitutional protection under the rights of Equal

Protection and Due Process of Law clauses who have suffered personal injury and/or property damage arising out of the negligent or wrongful acts or omissions committed by an inmate driving a State-owned vehicle while in the custody and control of the Department of Corrections for the State of Alabama.

B. The class so represented by Plaintiffs in this action, and of which Plaintiffs are themselves members, consist of all individuals, partnerships, corporations, or any "other persons" afforded constitutional protection under the rights of Equal Protection and Due Process of Law clauses who will suffer personal injury and/or property damage arising out of the negligent or wrongful acts or omissions committed as long as the Defendants allow inmates to operate state owned vehicles while those inmates are in the custody and control of the Department of Corrections for the State of Alabama.

VI.

The exact number of members of the class, as hereinabove identified and described is not known, but it is estimated that there are not less than 200 members. The class is so numerous that joinder of individual members herein is impracticable.

VI I.

There are common questions of law and fact in this action that relate to and affect the rights of each member of the class and the relief sought is common to the entire class, namely, that the Court make a determination that inmates as described above be found to be agents of the Department of Corrections for the State of Alabama while driving the vehicles at the direction and control of the prison officials, and that the prison officials have

acted with deliberate indifference in not actively soliciting coverage for these inmates under §36-1-6 and §36-1-6.1, Alabama Code (1975).

VIII.

The claims of Plaintiffs, who are representatives of the class herein are typical of the claims of the class, in that the claims of all members of the class, including Plaintiffs, depend on a showing of the acts and omissions of Defendants giving rise to the rights of Plaintiffs to the relief sought herein. There is no conflict as between any individual named Plaintiff and other members of the class with respect to this action, or with respect to the claims for relief herein set forth.

IX.

The named Plaintiffs are the representative parties for the class, and are able to, and will, fairly and adequately protect the interests of the class. The attorneys for Plaintiffs are experienced and capable of litigation in the field of civil rights and class actions and have successfully represented Plaintiffs in other litigation of this nature.

X.

This action is properly maintained as a class action in that the prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants herein, all of whom oppose the class. Furthermore, the prosecution of separate actions by individual members of the class would

create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

XI.

The Defendants have acted or refused to act on grounds generally applicable to the class; thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole necessary.

COUNT ONE

1. During all times mentioned herein, the Defendants, separately and in concert, acting under color of State law, statute, ordinance, regulation, custom, practice or usage of the State of Alabama, deprived the Plaintiffs their guaranteed rights as set forth under the Equal Protection and Due Process of Law clauses found in the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

2. Defendants authorize inmates, trustees, work release prisoners and other prisoners to operate State of Alabama owned vehicles with knowledge that these inmates, trustees, work release prisoners and other prisoners are without insurance and/or knew that the inmates, trustees, work release prisoners and other prisoners are judgment proof and that the Plaintiffs and all prospective Plaintiffs of the class are deprived of their Due Process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Defendants after entrusting the vehicles to these uninsured or

underinsured inmates, trustees, work release prisoners and other prisoners have denied liability for their actions.

3. Defendants separately and in concert have created a system of remuneration for persons injured as a result of accidents involving vehicles owned by the State of Alabama which is arbitrary and capricious and which allows for the deprivation of individual property rights without due process of law.

4. Defendants individually and in concert acted willfully, knowingly, grossly, negligently and unreasonably and with deliberate indifference to deprive the Plaintiffs of their Due Process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

5. As a direct and proximate result of the aforementioned acts of the Defendants, Plaintiffs have lost and will in the future lose large sums of money by reason of personal injury and property damage sustained.

WHEREFORE, Plaintiffs pray, for themselves and all of the members of the class:

(a) That the rights of the class members as set forth in the allegations hereinabove be adjudicated and declared;

(b) That the defendants be permanently restrained and enjoined from denying that inmates operating State-owned vehicles for and under the control of the Alabama prison officials are "agents" or "employees" of the State for the purposes of §36-1-6 and §36-1-6.1, Alabama Code (1975).

(c) That the Defendants be made to extend to Plaintiffs the same benefits and protection as provided to other private citizens in the State of Alabama who are involved in vehicular accidents with agents and employees of the State of Alabama;

(d) That the Plaintiffs be awarded attorneys' fees in accordance with 42 U.S.C. §1988.

(e) That the Plaintiffs have such other relief as the Court may seem appropriate, including costs and expenses.

COUNT TWO

1. During all times mentioned herein, the Defendants, separately and in concert, acting under color of State law, statute, ordinance, regulation, custom, practice or usage of the State of Alabama, deprived the Plaintiffs their guaranteed rights as set forth under the Equal Protection and Due Process of Law Clauses found in the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

2. Defendants authorize inmates, trustees, work release prisoners and other prisoners to operate State of Alabama owned vehicles with knowledge that these inmates, trustees, work release prisoners and other prisoners are without insurance and/or knew that the inmates, trustees, work release prisoners and other prisoners are judgment proof and that the Plaintiffs and all prospective Plaintiffs of the class are deprived of their Equal Protection rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Defendants, after entrusting the vehicles to these uninsured or underinsured inmates, trustees, work release prisoners and other prisoners have denied liability for their actions.

3. Defendants separately and in concert have created a system of remuneration for persons injured as a result of accidents involving vehicles owned by the State of Alabama which is arbitrary and capricious and which allows for the deprivation of individual property rights in violation of equal protection.

4. Defendants individually and in concert acted willfully, knowingly, grossly, negligently and unreasonably and with deliberate indifference to deprive the Plaintiffs of their Equal Protection rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

5. As a direct and proximate result of the aforementioned acts of the Defendants, Plaintiffs have lost and will in the future lose large sums of money by reason of personal injury and property damage sustained.

WHEREFORE, Plaintiffs pray, for themselves and all of the members of the class:

(a) That the rights of the class members as set forth in the allegations hereinabove be adjudicated and declared;

(b) That the defendants be permanently restrained and enjoined from denying that inmates operating State-owned vehicles for and under the control of the Alabama prison officials are "agents" or "employees" of the State for the purposes of §36-1-6 and §36-1-6.1, Alabama Code (1975).

(c) That the Defendants be made to extend to Plaintiffs the same benefits and protection as provided to other private citizens in the State of Alabama who are involved in vehicular accidents with agents and employees of the State of Alabama;

(d) That the Plaintiffs be awarded attorneys' fees in accordance with 42 U.S.C. §1988.

(e) That the Plaintiffs have such other relief as the Court may seem appropriate, including costs and expenses.

F. Hilton-Green Tomlinson
Bar Number: 423-60-7042